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No. 80-1002

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

THE BOARD OF EDUCATION OF THE HENDRICK HUDSON CENTRAL SCHOOL DISTRICT, WESTCHESTER COUNTY, and THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK,

Petitioners,

—against—

AMY ROWLEY, by her parents and natural guardians, CLIFFORD and NANCY ROWLEY, and CLIFFORD and NANCY ROWLEY in their own right,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONERS

RAYMOND G. KUNTZ
KUNTZ & SPLETZER, P.C.
Attorney for Petitioner Board of Education
Hunting Ridge Mall
Bedford Village, NY 10506
(914) 234-6363

TERESA KIERNAN KUNTZ
Of Counsel

ROBERT D. STONE
Deputy Commissioner for Legal Affairs
Attorney for Petitioner Commissioner of Education
State Education Bldg.
Albany, New York 12234
(518) 474-6150

JEAN M. COON
PAUL E. SHERMAN, JR.
DONALD O. MESERVE
Of Counsel

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PETITION FOR CERTIORARI GRANTED NOVEMBER 2, 1981

QUESTIONS PRESENTED FOR REVIEW

The principal questions presented for review are:

1. Whether the Court of Appeals misconstrued the function of a state plan for "free appropriate public education," approved by the Federal Commissioner of Education under the Education of all Handicapped Children Act of 1975 (20 U.S.C. 1401 et. seq.), when it failed to order dismissal of a Complaint to provide an interpreter for a deaf student, upon demonstration by the local school district that it was in conformity with the state plan.

2. Whether, assuming the Act mandates a provision of a "free appropriate public education," the

standard promulgated by the District Court and adopted by the Court of Appeals is erroneous under the Act.

3. Whether, assuming the Act mandates a provision of a "free appropriate public education," the Court of Appeals erroneously upheld the decision of the District Court, which was based, not on the unique needs of the Respondent, but on a particular philosophy of the education of the deaf.

4. Whether the federal courts have jurisdiction to hear cases arising under the Act, prior to completion of the administrative procedures contained in the Act.

5. Whether the attempt by Court of Appeals to limit the applicability of

its decision to the facts of this case constituted error.

PARTIES TO THE PROCEEDING

The caption contains the names of all parties to this proceeding before the Court of Appeals and the District Court. There are no additional parties.

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OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. A-1 to A-24)[1] is reported at 632 F.2d 945. The order of the Court of Appeals denying the Petition for Rehearing (Pet. App. H-1 to H-3) is not reported. The opinion (Findings of Fact and Conclusions of Law) of the District Court (S.D.N.Y.) (Pet. App.

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[1]Citations to "J.A." are to the Joint Appendix filed with this Brief; Citations to "Pet. App." are to the Appendices to the Petition for Writ of Certiorari; Citations to "R-A", "R-T", and "R-E" are to the Record (Appendix, Transcript, and Exhibits, respectively) submitted to the Court of Appeals for the Second Circuit, and certified and transmitted to this Court.

C-1 to C-24) is reported at 483 F.Supp. 528, and the District Court's memorandum opinion and order (Pet. App. D-1 to D-7) are reported at 483 F.Supp. 536. The District Court's order denying the School District's Motion to Dismiss the Complaint (R.A.-346) is not reported. The memorandum order of the District Court ordering the School District to retain a "qualified" rather than a "certified" interpreter (J.A. 384-386) is not reported. The decision of the New York State Comissioner of Education is contained in the Appendix to the Petition at E-1 to E-6), and the decision of the Independent Hearing Officer is contained in the appendix to the Petition at F-1 to F-25.

JURISDICTION

The Judgment of the Court of Appeals was entered on October 1, 1980. The Petition for a Writ of Certiorari was filed on December 15, 1980. This Court granted the Petition for the Writ of Certiorari on November 2, 1981. This Court's jurisdiction is invoked under 20 U.S.C. §1254(1).

STATUTE INVOLVED

This case involves Part B of the Education of the Handicapped Act, 20 U.S.C. §1401, §1411, et. seq., as amended by the Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773. The principal provisions of the Act, and

pertinent sections of the Regulations promulgated under it, 45 C.F.R. Part 121a.(now renumbered as 34 C.F.R. Part 300) are reproduced in the Appendix to the Petition to the Writ of Certiorari.

STATEMENT OF THE CASE

In September, 1977, Amy Rowley entered the Furnace Woods Elementary School, in the Hendrick Hudson Central School District, as a kindergarten pupil. Before her schooling commenced, her parents visited the school, requested that she be placed in a regular kindergarten class, and asked the Principal and the School District Administrators to do what they thought necessary to integrate her into a mainstream classroom.

In anticipation of her arrival, the Principal and many of the school's teachers took a sign language course in order to better communicate with Amy, who was the School's only deaf pupil. (R.A. 33-46, R.A. 159-161). The District purchased a teletype machine

for the school's office, in order to communicate with Amy's parents, who are also deaf. (Pet. App. C-4; 483 F.Supp. 528, 530).

Amy's parents agreed with the District that her kindergarten year was to be a data gathering trial period, during which an assessment of Amy's educational needs would be made. (R.A. 32-37; 483 F.Supp. at 530). She was tested and her hearing level determined. Amy was found to have significant residual hearing in the lower frequencies and to be able to distinguish vowel sounds without amplification (J.A. 299).

She was first provided with no special assistance. Then several hearing aids were tried. The system ultimately selected was an Earmark FM

wireless, a discrete sound amplification device which amplifies only the sound spoken into the microphone unit, thereby blocking out background noise. The microphone can be used by the teacher and the other pupils in Amy's class (R.A. 33-36).

In order to determine whether Amy could benefit from a sign language interpreter, the District placed an interpreter in her class for a two week period from February 27, to March 10, 1978. The educators who evaluated Amy's performance while the interpreter was in the classroom, including the interpreter, Jack Janik, who was a certified teacher of the deaf, all concluded that interpretive services were not useful for Amy (R.A. 40-44).

Despite their manifest agreement

that the kindergarten year would be a trial period, Amy's parents, without the prior knowledge of the District, filed a Complaint with the Department of Health, Education and Welfare, alleging that the District's failure to provide a sign language interpreter in her classroom was a violation of §504 of the Rehabilitation Act of 1973. (29 U.S.C. §701, et seq.) However, after an investigation which included observations of Amy's class, HEW found no violation (J.A. 155-156, R.A. 324-326).

Taking into account what had been learned about Amy during her kindergarten year, the District Committee on the Handicapped, in October, 1978, drew up a program to provide an appropriate education for

Amy. After consulting experts suggested by the Rowleys, listening to Amy's parents and reviewing material submitted by them, visiting Amy's classroom and classrooms in other school districts where deaf children were taught, the Committee recommended that Amy be placed in a regular first grade classroom; that she be provided with the continued use of the Earmark FM wireless; and that she receive the services of a certified teacher of the deaf one hour each day, and the services of a speech therapist three hours per week. This plan was then incorporated into Amy's individualized education program ["IEP"]. (R.T. 22-24). The IEP is reproduced at R.A. 173-196.

Amy's parents disagreed with the recommendation and with the IEP, on the ground that Amy was not provided with a sign language interpreter. They appealed the Committee's determination to an Independent Hearing Officer. [2]

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[2]The Committee made its decision on October 3, 1978. The Rowleys filed a Notice of Appeal to the Independent Hearing Officer (pursuant to 8 N.Y.C.R.R. §200.5), but then asked the Committee to consider an Affidavit which they deemed essential, but were unable to procure by October 3. The Rowleys did not submit the Affidavit until late November. The Committee met again on December 11 to consider the affidavit, and adhered to its original determination. The hearing before the Independent Hearing Officer was held on December 20; his decision was rendered on January 12, 1979. R.A. 282-286.

Testimony was taken at the hearing from witnesses for the Rowleys and for the School District. The Hearing Officer upheld the Committee's determination, on the ground that Amy had achieved excellent educational, academic, and social progress.[3]

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[3]The Rowleys were represented by counsel before the Committee, and before the Independent Hearing Officer. Their direct case before the Hearing Officer (J.A. 24-39) consisted of testimony by three witnesses, the substance of which was that Amy was deaf and her parents wanted an interpreter in her class. In his decision, the Hearing Officer noted that the Rowleys presented no evidence to him on Amy's educational, academic or social progress, while the District had presented extensive and convincing testimony that her performance in those areas was excellent. (Pet. App. F-22).

The Rowleys appealed to the New York State Commissioner of Education, who upheld the Committee's determination on April 10, 1979.[4]

On April 24, 1979, the Respondents commenced an action against the School District in the United States District Court for the Southern District of

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[4]The Respondents submitted to the Commissioner three Affidavits (J.A. 91-121) which contradicted the testimony given by the Rowleys before the Hearing Officer, and which denigrated Amy's classroom performance and adjustment. The Commissioner did not specifically exclude the Affidavits, but based his decision on "a review of the Record before the Hearing Examiner." (Pet. App. D-4) The District Court excluded the Affidavits when the Rowleys attempted to admit them at the conclusion of trial, but reversed itself in a post trial memorandum decision (Pet. App.D 1-7).

New York. The Complaint alleged that the District had failed to provide Amy with an education "coterminus with her non-handicapped peers" in violation of the State Act (N.Y. Education Law §§ 4201-4210, 4351-4257, 4401-4409 (McKinney's); 8 N.Y.C.R.R. §§200.01 et seq.); §504 of the Rehabilitation Act of 1973; (29 U.S.C. §§701, et. seq.); and The Education of All Handicapped Children Act of 1975 (20 U.S.C. §§1401 et. seq.) and §1983 (42 U.S.C. §1983).[5]

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[5]At the District Court Trial, the Respondents only advanced their claim under the Education of All Handicapped Children Act and appear to have abandoned their other claims.

The District moved to dismiss the Complaint on the grounds that the Respondents had failed to name a necessary party, the Commissioner; that the Commissioner was the only proper defendant since his decision was independent under the Act; that the District was in full compliance with the State Plan as set forth in the State law and regulations, which did not require an interpreter; and that the allegation that Amy's education was not "coterminus" was insufficient to establish jurisdiction. (R.A. 315-323)[6]

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[6]The School District's allegation that the Complaint should be dismissed on a showing that it had complied with the State plan is contained in its Reply Memorandum of Law. (R.A. 332-333).

The District Court denied the Motion, without addressing any of the issues raised by the District, except that it ordered the New York State Commissioner of Education added as a party. The Rowleys and the District (the Commissioner had not yet been joined as a party) stipulated that the Court's judgment over Amy's 1978-79 placement would be binding on the parties for the 1979-80 school year.[7]

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[7]The original Complaint was filed on April 24, 1979. An Amended Complaint was served on May 31, 1979. The District's motion to dismiss the Complaint was served on June 18, and the hearing was held on July 15. On August 15, the Rowleys moved for a preliminary injunction. On return of the Motion, on August 17, the Court said it would not decide the Motion

At the hearing on the preliminary injunction, the Commissioner objected to the Court's jurisdiction, on the ground that no determination for the 1979-80 school year could be made without the Commissioner's prior review of that school year, which had not occurred. The Court denied the Motion. At the conclusion of the hearing on the Motion for the preliminary injunction, by stipulation, it was deemed a trial on the merits.

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without a hearing, which is scheduled for September 29. The Court also said it would shortly issue a decision adding the Commissioner as a party, which it did on August 22. The Stipulation was made on August 17, the return date of the motion to dismiss. By that time the Committee on the Handicapped had already determined Amy's placement for the 1979-80 school year, with no change. The Stipulation was limited to that year. (R.T. 14-16).

On December 28, 1979, the District Court issued an order reversing the decision of the Commissioner of Education and ordering the District and the Commissioner to provide Amy with the services of a certified interpreter for the deaf (Pet. App. B-1). The District Court then issued two separate opinions stating its findings of fact and conclusions of law. (Pet. App. C.1-24, 483 F.Supp. 528; Pet. App. D.1-7, 483 F.Supp. 536).

The Court held there was no statutory definition of "free appropriate public education" (Pet. App. C.9, 483 F.Supp. at 533) and that consequently it was free to formulate its own definition, i.e., that each handicapped child be given an opportunity to achieve a full potential

commensurate with the opportunity provided to other children. (Pet. App. C.11, 483 F.Supp. at 534).

The Court said that its standard required the School District to measure the potential of the handicapped child, compare that potential to his performance, and compare the resulting shortfall to the shortfall experienced by non-handicapped children (Pet. App. C.11-12, 483 F.Supp. at 534). It held that no evidence had been received to determine or compare Amy's shortfall from potential, and it was thus free to order provision of an interpreter for Amy because "every deaf child hears better in class with an interpreter." (Pet. App. C.15, 483 F.Supp. at 535).

In a separate opinion (Pet. App. 1-7, 483 F.Supp. 536) the Court held

that the Commissioner had no right to review the determination for the 1979-80 school year prior to the Court's review. The Court said that, given the necessity for review by an independent hearing officer and the Commissioner of Education, the case would not reach the Court until the middle of the school year, and would be moot by the end of the year, thus making it capable of repetition, yet evading review. The Court also said that in any case predicated on 20 U.S.C. §1415 (e)(2) the Court had power to grant "appropriate" relief, which would include injunctive relief extending beyond the school year at issue. (Pet. App. D.3, 483 F.Supp. at 538).

In its separate opinion, the Court also ruled that three Affidavits

submitted to the Commissioner, which were explicitly excluded from the trial, (R.T. 396-397, 428-432) had been admitted post trial and considered by the Court, on the ground that the Commissioner had erroneously failed to consider them.

The School District and the Commissioner appealed. The majority of the panel of the Court of Appeals of the Second Circuit affirmed (Pet. App. 1-7, 632 F.2d 945), substantially for the reasons set forth in the District Court's opinion (Pet. App. A.6; 632 F.2d at 947). It said the Court below had meticulously and precisely applied the standard for free appropriate public education prescribed by Congress; it did not rule on the contested affidavits, stating that the

Respondents had proved their case without them. (Footnote 6 to the Court's opinion, Pet.App.A.7).

The affirmance was based on the purportedly unique facts of the case, and the Court invoked a Second Circuit Rule which precluded citation of its decision as authority in any other case. (Footnote 7 to the Court's opinion, Pet. App. A.7-8, 632 F.2d at 948).

Judge Mansfield dissented (Pet. App.A.8-24) on the ground that the District Court mistakenly formulated its own definition of an appropriate education, then misapplied its standard to reach a wrong result; ignored the role of the State Commissioner; ignored the role of the State Plan and the fact that it did not provide for an

interpreter; and denied the due process to defendants by admitting post trial the three contested affidavits which could not be cross-examined.

He criticized the definition of appropriate education as unfeasible, impractical, and impossible to use as a means of evaluating the appropriateness of a handicapped child's education. He praised the School District's "Herculean efforts" to provide Amy with an education suitable to and compensating for her hearing deficiency, which he said had met with "remarkable success." (Pet. App. A.11, 632 F.2d at 950).

Judge Mansfield said that the purpose of the Act was to forward the goal of self-sufficiency for handicapped persons, a result he said

would not occur if Amy was provided with an interpreter. He said application of the proper standard would have yielded one result, and that the action should have been dismissed.

A Petition for a Rehearing En Banc was denied, and a stay of the District Court's Order, granted shortly after the filing of the Notice of Appeal, was vacated. A Petition for a Writ of Certiorari was filed on December 15, 1980. On February 23, 1981, the Court asked the United States to submit its position on the Petition for the Writ. The United States submitted a Brief Amicus Curiae in September, 1981. Certiorari was granted on November 2, 1981.

SUMMARY OF THE ARGUMENT

The Act is a "funding statute". It did not create a federal right to free appropriate public education. That term describes the limitations of the state's undertaking when it submits its plan to the Secretary for the purpose of obtaining his approval as a condition for federal aid. In accepting federal funds, the states do not undertake to provide particular (i.e. "appropriate") methods of educating handicapped children. The Act's provisions for judicial review do not enlarge the scope of the states' obligations. The District Court should have dismissed the Complaint when the School District demonstrated that its program for the education of the Respondent was in conformity with the

State plan approved by the Secretary.

Assuming arguendo that there is an enforceable right to free appropriate public education, the definition adopted by the District Court is not authorized by the Act, and is an impractical and impossible test of the appropriateness of a handicapped child's education.

The District Court's definition of appropriate education left it incapable of assessing the Respondent's unique needs, as required by the Act. The District Court held that the Respondent was entitled to the services of a sign language interpreter by determining that all deaf children would benefit from that service. That method of determination violates the Act, and disregards the uncontested fact that

the Respondent was succeeding academically and socially without the service.

It was error for the Court to hold that the review provisions of the Act (1415(e)(2) gave it power to order injunctive relief for the 1979-80 school year, and beyond, prior to the completion of the administrative review required under the Act. The Court should have granted the Commissioner's motion to dismiss the Complaint for lack of jurisdiction, and should have awaited the completion of administrative proceedings before reaching a determination for the 1979-80 school year.

The Court of Appeals should not have used its rule limiting the applicability of Bench decisions, in order to sustain the result reached by

the District Court. The District Court's result was wrong, its method of determination erroneous, and the Court of Appeals should have reversed the decision and dismissed the Complaint.

ARGUMENT

1. The Court below should have dismissed the Complaint when the School District demonstrated that its individualized educational program for the Respondent was in conformity with the State plan.

The Courts below read the scope of the rights created by the Act too broadly, and exceeded their remedial powers in compelling the District and the Commissioner to provide the Respondent with a sign language interpreter in her regular class.

The Act did not create substantive individual rights to free appropriate public education. Pennhurst State School and Hospital v. Halderman, ____ U.S. ___, 101 S.Ct. 1531 (1981); McCowen v. Hahn, _ F. Supp. ____, 3 EHLR 533:131 (N.D. Ill. 1981). At the time Congress passed the Act, this Court had

decided San Antonio School District v. Rodriguez, 411 U.S. 1 (1973), in which it held that education was not a right accorded explicit or implicit protection under the Constitution. It is highly unlikely that Congress, in passing the Act two years after the Rodriguez decision, intended the Act to enforce rights in an area where there are serious Constitutional questions over the validity of imposing affirmative obligations on the states. Under the tests laid down in Pennhurst, legislation passed pursuant to Section 5 of the Fourteenth Amendment should expressly articulate such intent. The Act does not.

In its statement of findings and purpose under the Act, Congress said:

> (c) It is the purpose of this Act to assure that all handicapped

> children have available to them, with the time periods specified in section 612(2)(B), a free appropriate public education which emphasizes services designed to meet their unique needs, to assure that the rights of handicapped children and their parents or guardians are protected, to assist States and local authorities to provide for the education of all handicapped children and to assess and assure the effectiveness of efforts to educate handicapped children.
> Pub. Law 94-142, 89 stat. 775, 1975.

The legislative history of the Act also demonstrates that Congress did not intend to create a federal right to free appropriate public education, if indeed it had the power to do so. The original Senate Bill stated that it was the purpose of the Act to "insure" that all handicapped children have available to them a free appropriate public education and to "insure" that the rights of the handicapped child are protected. The House amendments

changed that to "assure." The Senate bill also stated that the purpose of the Act was "to relieve the fiscal burden placed on States and localities" in providing for the education of handicapped children. The House amendments stated the purpose is "to assist States and localities" to provide for the education of handicapped children. The House amendments were incorporated into the law. S. Conf. Rep. No. 94-455, reprinted [1975] U.S. Code Cong & Ad. News 1480, 1482.

The Act is clearly a "funding" statute passed by Congress under the Spending Power of the Constitution, Art. 1 §8 cl.1. It does not create a substantive right to free appropriate public education on behalf of the individual plaintiffs. The purpose of

the Act is to make funds available to qualifying states to assist them in providing educational opportunities for the handicapped. Loughran v. Flanders, 450 F.Supp. 110, 113 (D.Ct. 1979); Eberle v. Board of Public Education, 444 F.Supp. 41, 43 (D.Pa. 1977), aff'd., 582 F.2d 1274 (3rd Cir. 1978).

While Congress may fix the terms under which it will disperse Federal monies, such legislation is in the nature of a contract. The legitimacy of the power of Congress to legislate under the Spending Power rests on whether the state voluntarily and knowingly accepts the terms of the contract. There can be no knowing acceptance if the state is unaware of the conditions or is unable to ascertain what is expected of it. Conditions imposed on the grant of

federal monies must be done unambiguously. Pennhurst State School and Hospital v. Holderman, _____ U.S. _____, 101 S.Ct. 1531 (1981).

In accepting the federal funds, the states did not undertake to provide a particular (i.e., "appropriate") method or methods of educating handicapped children. Nor did the states consent to a procedure whereby the courts, under the review power of the Act, would ultimately direct the states as to what education was appropriate, on a case by case basis, as contended by the Respondents.

The Act is quite clear that, in requiring the states to provide a free appropriate public education as a condition for the receipt of federal monies, the content of that education is left to the states. 20 U.S.C.

§1401(18). The requirement (20 U.S.C. §1412; 1413(c) that the Secretary of Education approve the state's plan is simply a prerequisite for the receipt of the funds under the Act, and does not convert the state's plan into a federal right to free appropriate education.

The Act's requirement that each state plan also include a provision to develop an individualized educational program suited to the unique needs of the individual handicapped child, does not remove the Act's provisions for a free appropriate public education from the category of a statement of federal policy, and impose an affirmative obligation on the states and the local school districts to provide a particular form of education for each child. That requirement simply means

that the state must demonstrate to the Secretary that its plan makes provision for educating handicapped children according to a system which is devised to investigate and evaluate individual needs. The details of the system are left to the states. The provisions of the law requiring the plan to contain such a system are in place to guide the Secretary on how he should exercise the discretion given him under the Act to evaluate the plans submitted to him.

The Act makes these distinctions quite clear in its definition of free appropriate public education:

> (18) The term "free appropriate public education" means special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State eduational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in

> conformity with the individualized education program required under Section 1414(a)(5) of this title. 20 U.S.C. 1401(18).

If it was the Act's purpose to create a federal plan of education, it would not have defined free appropriate public education as "special education and related services which . . . meet the standards of the State educational agency." 20 U.S.C. 1401(18)(B). It would have defined it as special education and related services which meet the standards of the Secretary (as set forth in his Regulations, or in some other fashion). It did not.[8]

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[8]This Brief does not address the issue of what limitations would exist if Congress had attempted to impose such an obligation upon the states under the Spending Power, since it is

In his dissent in this case, Judge Mansfield addressed the issue of the role of the state plan. He said:

> Thus the scope and range of an appropriate education is left primarily to the states, which are given broad authority to prescribe the details of educational policy in individual cases and must present specific plans for approval to the United States Commissioner of Education who, if he finds that a state's plan is not in conformity with the Act and federal regulations thereunder, may withhold funding, with the state given a right of appeal to a federal court of appeals, 20 U.S.C. Section 1416. See, e.g., Epperson v. Arkansas, 393 U.S. 97, 104

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the position of the Petitioners that the Act does not create such a requirement. Thus, the Petitioners have not addressed the "Constitutional difficulties" with imposing affirmative obligations on the states pursuant to the Spending Power. See Steward Machine Co. v. Davis, 301 U.S. 548, 585 (1937); Lau v. Nichols, 414 U.S. 563, 569 (1974).

> (1968) ("By and large, public education in our Nation is committed to the control of state and local authorities").
>
> Pursuant to the Act, the State of New York has adopted parallel legislation and the State Commissioner has promulgated specific regulations which do not require provision of a sign language interpreter. Moreover the state's plan for education of handicapped children, which does not provide for sign language interpreters, has been approved by the federal Commissioner. In view of the approved plan's specificity with respect to audiology services, and the statute's policy in favor of administrative determination of what services are appropriate, a very strong showing is required to depart from that policy. The showing here does not meet that test. (Pet App. A-15 to A-20. 632 F.2d 945, 951

While Judge Mansfield's opinion did not reach the issue of what showing would be necessary to set aside the State's determination, the District Court was not troubled by such considerations, apparently accepting the theory that a new federal substantive right

enforceable by the courts had been created.[9] After an erroneous finding that the Act did not contain a definition of free appropriate

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[9]The Court adopted the reasoning set forth in the Harvard Law Review (Vol. 92: 1103-1127) which the Court cited for the proposition that the Act contained no definition of free appropriate public education. (Pet.App. C-10 to C-11). The note states that the Act gave the Courts and administrative hearing officers "broad authority to prescribe the details of educational policy in individual cases" (p. 1105). In a footnote to sustain that proposition, the note cited the remedial provisions of the Act, 20 U.S.C. 1415(e)(2) for the proposition that "a judge or hearing officer could order implementation of whatever program she deemed appropriate." (Footnote 37, p. 1108).

public education, and thus unaware of the state's role, and unaware that no substantive right had been created, the Court held:

> Aside from the HEW regulation quoted above, it has been left entirely to the courts and hearing officers to give content to the requirements of an "appropriate education." (Emphasis supplied) Pet. App. C-11; 483 F.Supp. 528, 534.

Under its reasoning the Court did not have to resolve the question of whether the School District was providing an appropriate education by inquiring whether its program was in conformity with the State's requirements. Instead, it created its own definition of free appropriate public education and applied that definition against the State and the District.

An analysis of the scheme of the Act reveals that "free appropriate

public education" is not a mandate to be filled out by the decisions of the hearing officers and the courts, but a "goal" which the state will strive to attain, given its resources and needs.

Once a state has demonstrated eligibility, it must then submit to the Secretary a plan demonstrating that the funds received will:

> . . . be utilized by the State or any of its political subdivisions, only in a manner consistent with the goal of providing a free, appropriate public education for all handicapped children . . . (emphasis supplied).
> 20 U.S.C. 1413(a)(2).

§1412(1), which requires the state to "qualify for assistance" by demonstrating to the Secretary that it has in effect a "policy" that assures all handicapped children the right to a free appropriate public education, does not create a "right" to a free

appropriate public education. That section only establishes a condition that each state must meet in order to qualify for Federal funds. McCowen v. Hahn, ___F.Supp. ____, 3 EHLR 533:131 (N.D. Ill. 1981). No right having been created, the Petitioners' determination not to provide a sign language interpreter did not deprive the Respondents of any statutory right. Id.

In effect, the complaint in this case challenged New York State's plan. The State's plan does not include provision of sign language interpreters for deaf pupils in regular elementary school classrooms; neither does it forbid such a service, if the local school district elects to provide the service. Whether that is a correct judgment is for the Secretary to

review, not the District Court. The Act contains specific procedures for invalidation of state plans, and court action by individuals is not a part of it. Individuals are not remediless, since the State must hold public hearings prior to submission of its plan. 20 U.S.C. 1412(7). The Secretary is empowered to withhold funding from states for noncompliance with the mandates of the Act. If he does so, the State is entitled to seek judicial review. 20 U.S.C. 1413, 1416.

In formulating its plan, the state has to take into account the resources it will devote to the various forms of remediation, the practicality and feasibility of those measures, and the likely efficacy of those measures, given the limitation of the state's

resources. The cost of interpretive services for Amy will be approximately $20,000-$25,000 per year, at current rates. An extension of that cost the similarly situated deaf students in the state would cost over $100 million dollars per year. In effect, the District Court took testimony from experts on deaf education, formulated its own state plan, and applied it to this case. While arguments can be made that the Court's plan was a good plan, the development of such plans has been left to states.[10]

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[10]There are approximately 7,000 deaf and hard of hearing pupils in New York. See Table D-1.1(B), 2nd Annual Report to Congress on the Implementation of Public Law 94-142 (U.S. Department of Education 1980), p. 162. The cost is an approximation which assumes group instruction.

Cost considerations, and the apportionment of tax revenues, will mean that different states will reach different results. Judge Sloviter, in his opinion (concurring and dissenting in part) in Battle v. Pennsylvania, 629 F.2d 269, 284, (3rd Cir., 1980), cert.denied. sub.nom. Scanlon v. Battle, 80-827, June 22, 1981, stated:

> I agree with both of my colleagues that the contours of the state's program must be defined by the state. It is the state which must determine which specific programs should be offered, how those programs must be structured, and how the delicate and intricate balancing of funds and resources between handicapped and non-handicapped children must be managed. In the process, different states may establish somewhat varying immediate goals as steps toward realization of the federal policy.

If, however, the District Court's opinion is correct, and it has been left entirely to the courts and hearing officers to determine what is

appropriate education, what fiscal or other limitations are placed upon the exercise of that discretion? Must the local school district do anything to ameliorate the adverse impact resulting from the disability, regardless of cost? That question has been answered in the affirmative by the Third Circuit. In Kruelle v. New Castle County School District, 642 F.2d 687, 694 (3rd Cir. 1981), the Court held:

> Under the Education Act, in contradistinction [to the Rehabilitation Act] schools are required to provide a comprehensive range of services to accomodate a handicapped child's educational needs, regardless of financial and administrative burdens [Footnote omitted] . . .

The Third Circuit cited the Second Circuit's opinion in this case for its rule that financial and administrative burdens are irrelevant. If that rule is correct, then Congress has created a

scheme of unlimited liability for the states and local school districts. However, there is nothing in the provisions of the Act which give notice to a state that in submitting its plan as condition for federal aid, it was obligating itself to such a massive undertaking. There is also nothing in the law which indicates that was Congress' intent.

There remains to be considered whether the scope of judicial review under the provisons of the Act has enlarged the liability of the states beyond the undertakings specified in the other sections of the Act. It is submitted that it does not.

§1415 of the Act requires the state to establish and maintain "guaranteed procedural safeguards" for handicapped children and their parents with respect

to the provision of free appropriate public education. This provision has been held to create a substantive right, but only to invoke the Act's procedural safeguards. McCowen v. Hahn, 533 EHLR, at 133.

In McCowen, the Court stated:

> That section [1415] creates the right to a hearing on any issue relating to the placement of a handicapped child, as well as the right to certain procedural safeguards. Moreover,the statute on its face requires exhaustion of administrative remedies; the right to bring an action in Federal court is limited to any party aggrieved by the agency decision. As other district courts have noted, this is a limited jurisdictional grant; "it only authorizes review of claims alleging (1) errors in the evaluation or placement of the handicapped student, or (2) a denial of the Act's numerous procedural safeguards." Loughran v. Flanders, 470 F.Supp. 110, 113 (D.CT.1979).

The District Court in this case took a different view. It expanded the scope of its review far beyond the limits of

that power as described in the Act.[11]

§1415(b)(1)(E) gives the parents the right to present a complaint with respect to any matter relating to the provision of a free appropriate public education; to process that complaint to the state pursuant to its procedures (§1415(b)(2); and, if aggrieved by the findings and decision of the state agency, to bring a civil action with respect to the complaint to a state or federal court (§1415(e)(2). That latter provision states:

> In any action brought under this paragraph, the Court shall receive the records of the administrative

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[11]In their Complaint, the Respondents alleged a violation of the procedural rights guaranteed by 1415, but did not offer any proof in that regard at the trial.

proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

In Anderson v. Thompson, _____ F.2d ____, 3 EHLR 533: 105 (7th Cir. 1981), the Court construed its power under §1415(e)(2) and said:

> Congress instead has designed a detailed and multilevel procedure through which an aggrieved parent can ultimately seek an appropriate program decision from the District Court. 533: at 108.

In effect, the Court held that the power to "grant such relief as the court determines is appropriate" gave it the power to devise an "appropriate" education. The two terms are not the same. The power to grant "appropriate relief", must be read in light of the fact that the Act is a funding statute, and creates no substantive right to an

appropriate education. In giving the courts the power to devise appropriate relief, the Act did not empower them to create new substantive rights or to order particular forms of education.

The procedural safeguards are in place to resolve questions over procedural regularity, such as procedures to determine correct diagnosis and correct classification as a handicapped child. The scope of the Court's jurisdiction is limited to such issues, which deal with whether, in a particular case, the state must devise an individualized education program for a particular child. It does not extend to determining what is the appropriate program, a task left under the Act to the states and the local school districts.

In its motion to dismiss the

complaint, the District asserted that its program for the Respondent was in accord with the State plan. J.A. 137-157. The Respondents did not contest this assertion, but contended that it was irrelevant. The District Court should have dismissed the complaint upon the District's motion.

2. The definition of free appropriate public education formulated by the District Court, and affirmed by the Court of Appeals, should be overturned.

Although a definition of free appropriate public education is contained in the Act and the Regulations promulgated thereunder, the District Court ignored that definition and formulated one which is unnecessary, which fails to conform to Congressional intent, and which is incapable of implementation.

The Act and regulations define free appropriate public education (20 U.S.C. §1401(18); 45 C.F.R. 121a.4), as well as its components: special education and related services.

The Act defines "special education" as follows:

> (16) The term "special education" means specially designed instruction, at no cost to parents

> or guardians, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions.
> 20 U.S.C. §1401(16).

Related services are defined under the Act as follows:

> (17) The term "related services" means transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a handicapped child to benefit from special education, and includes the early identification and assessment of handicapping conditions in children.
> 20 U.S.C. §1401(17).

The regulations restate these definitions and amplify them. 45 C.F.R. 121a.(13)(14).

Taken together, these definitions delineate the scope of the education to

be provided to handicapped children under the Act.

The child's education must be provided without charge (i.e., free); it must include an appropriate preschool, elementary or secondary school education within the State, in conformity with the I.E.P. developed for the child (i.e., appropriate); and it must be provided at public expense, under public supervision and direction, and must meet the standards of the State educational agency (i.e., public). The child must receive, at no cost to the parents, instruction which is designed to meet his unique needs. Not only must classroom instruction and instruction in physical education be provided, but also instruction at home or in hospitals or institutions. The child must be provided with

transportation, developmental, corrective, and other support services, if such services are required in order to enable him to benefit from the specially designed instruction. Support services such as speech pathology, audiology, psychological services, physical and occupational therapy, and recreation must be provided if the handicapped child cannot benefit from his specially designed instructional program without them.

This definition does not set forth the specific educational program which must be provided to any individual child, and it would be irrational to expect it to do so. However, what it does do is to set up a framework within which state and local educational agencies can determine whether

particular instructional programs and supportive services enable individual handicapped children to benefit from their educational experience. Thus, the Act and Regulations contain a definition of free appropriate public education which clearly sets forth the Federal goals, while simultaneously enabling state and local educational agencies to fulfill the purpose of the Act by providing for the unique needs of the individual child.

The District Court disregarded the statutory delineation of the parameters of free appropriate public education, and mandated that

> Each handicapped child be given an opportunity to achieve his full potential commensurate with the opportunity provided to other children.
> Pet. App. C-11; 438 F.Supp. 528, 534.

The Court then stated that this standard:

> Requires that the potential of the handicapped child be measured and compared to his or her performance, and that the resulting differential or "shortfall" be compared to the shortfall experienced by non-handicapped children. Pet. App. C11-12; id. at 534.

This definition, and the standard which must be applied in order to implement it, are not only unnecessary, but are inconsistent with the legislative intent. In fact, they far exceed the intended scope of free appropriate public education under the Act.

In 1975 the Senate Committee on Labor and Public Welfare issued its report on S.6 (which ultimately became the Education for All Handicapped Children Act of 1975), S. Rep. 94-168 (1975 U.S. Code Cong. & Ad. News p. 1425). The background portion of this

report reveals that the legislation was originally introduced as S. 3614 in May 1972, following two landmark court decisions establishing the right to an education for all handicapped children: Pennsylvania Association for Retarded Children (P.A.R.C.) v. Commonwealth of Pennsylvania, 334 F.Supp. 1357 (ED Pa 1971), 343 F.Supp. 279 (ED Pa 1972) and Mills v. Board of Education of the District of Columbia, 348 F. Supp. 866 (DDC 1972). The decisions were cited with approval both in the Senate report and in H. Rep. 94-332, the House's committee report on its own version of the legislation.

P.A.R.C., supra was the first major suit focusing on the particular learning needs of mentally retarded children. It ultimately resulted in a consent agreement which established

that "each mentally retarded child must receive education and training appropriate to the child's capacity."

The use of the term "appropriate", however, must be viewed in terms of the facts of the case. Prior to the filing of the action, Pennsylvania excluded from attendance students found unable to profit from instruction.

The Court in P.A.R.C., supra, found, based on expert testimony, that all mentally retarded persons were capable of benefiting from some form of education. 334 F.Supp. at 1359. While it recognized that various additional services might be required, nothing in its decision implies that the standard to be utilized would be "maximization of potential" or anything approaching this.

The Court in Mills, supra, was primarily concerned with providing some educational services to those who had been previously excluded, and its order spoke of adequate alternative educational services, rather than maximization of potential. In fact, it appears that the Court clearly recognized that lack of sufficient funds would excuse a failure to provide all the services required by a handicapped child, so long as a disproportionate burden was not borne by the handicapped population. 348 F.Supp. at 876.

The Education for All Handicapped Children Act of 1975, commonly referred to as P.L. 94-142, replaced legislation which was passed the year before, P.L. 93-380, the Education Amendments of 1974, which contained the first

Congressional use of the term "appropriate" in relation to education. §612(d) of that Act required, inter alia, the states provide

> . . . (b) procedures to insure that, to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped...

The term "appropriate" as used in this legislation is a limitation on the requirement of mainstreaming, rather than a mandate that certain services be provided to develop a child's potential.

A year later the Senate Committee on Labor and Public Welfare, in its report on S. 6 (S. Rep. 94-168) discussed the provisions in the 1974 Act regarding "appropriate education":

> Amendments enacted in Public Law 93-380 established basic due process procedures and protections,

> a priority for service to handicapped children who are not receiving an education, a prohibition on discrimination in testing, and provision of educational services in the least restrictive environment appropriate to the needs of the handicapped child. (emphasis supplied).

Again, it appears from the language of the Committee report that the term "free appropriate public education" related to the mainstreaming requirement in the 1974 Act rather than to the specific services to be provided. The term appropriate, therefore, referred only to where the child was placed.

The Congressional floor debate on S. 6 and on S. Rep. 94-455, the Conference Report in which a compromise between the two houses was reached, primarily consisted of prepared statements by members of Congressional

committees concerning the millions of handicapped who were not receiving educational services (See 121 Cong. Rec. S. 10955, 121 Cong. Rec.H. 11346, 121 Cong. Rec. S 20426 (1975). An examination of both the committee reports and the debates indicates that Congress intended only to end the exclusion of handicapped children from the educational process. Senator Stafford commented on the basic priorities of the legislation:

> Second, Mr. President, the Congress last year in Public Law 93-380, which revised and extended part B of the Education of the Handicapped Act, a priority was set for services for those children who were receiving no services. This full service goal has not yet been met.
> 121 Cong. Rec. 19483 (1975)

Senator Williams stated that:

> providing appropriate educational services now means that many of these individuals will be able to become a contributing part of our

> society, and they will not have to depend on subsistence payments from public funds.
> 121 Cong. Rec. 19492 (1975).

Senator Randolph concurred in this view and stated that passage of the bill would

> give these children the educational services they need to compete in today's changing world.
> 121 Cong. Rec. 37410 (1975).

In the debate in the House, Congressman Harkin said:

> With proper educational services provided now, at a young age, these children can become productive citizens, contributing to society instead of being left as burdens on our society.
> 121 Cong. Rec. 25541 (1975).

There is nothing in the floor debates or in the Conference Report which indicates that any member of Congress ever intended the legislation to encompass provision of an opportunity to achieve full potential.

The legislative history demonstrates that the District Court's definition is at variance with the purpose of the Act. The Act was intended to assure educational services to all handicapped children, in order that they could become independent, self-sufficient members of society, insofar as their handicapping conditions allow. It was not enacted to compel school districts to provide the handicapped with the opportunity to achieve maximum or full potential, however desirable that goal may be. It is clear that the legislative intent is provision of services which meet educational needs of the handicapped child, rather than provision of an opportunity to achieve full potential commensurate with the opportunity provided to other children.

Not only is the definition of free appropriate public education formulated by the District Court unnecessary and in derogation of Congressional intent, it is unworkable and requires application of an unfeasible standard. Adherence to the guidelines contained in the statutory scheme, evaluation of the educational needs of the individual child, and provision of instruction and support services designed to meet those educational needs, are the goals of the Act. If the judicially created definition is allowed to stand, the difficulty of determining whether an individual handicapped child is being educated in conformity with the Act will be compounded, rather than simplified. The words "potential" and "shortfall" will have to be defined, and a system for measuring them will

have to be devised. The District Court held that intellectual caliber is not the sole determinant of potential, and that energy, initiative, intellectual assertiveness, rapport with teachers, and interest in learning are also components. Pet. App. C13-14, 483 F.Supp. 528, 534-535. At the present time, there exists a wide body of scientific and educational knowledge on the subject of academic and psychological testing. However, tests to measure potential, and a student's shortfall from that potential, do not yet exist.

While an attempt to evaluate the potential of a single child would prove to be an extremely difficult task, it would probably not be insurmountable. It would take time, money and trained personnel, but it may be possible that

some formula which would come close to measuring it could be devised. However, to apply the same type of evaluative techniques to large groups of children would surely be an impossible task. Further, even if the schools designed a way to do it, the likelihood of parental objection to the subjection of their children to such exhaustive testing would arise.

Assuming arguendo, that shortfall from potential is measurable, how is the population against which the handicapped child's shortfall is to be judged to be determined? If the population is to be the children in the same class or school district, a handicapped child in a group of overachievers would receive maximum help, but one in a group of underachievers would be severely

deprived.

The District Court's definition enlarges the scope of judicial review in a manner never contemplated under the Act. It places upon the state and federal courts the burden of determining whether the state or local educational agency has measured the potential and shortfall from potential of the handicapped and non-handicapped children in a given population, whether the tests are appropriate measures of that shortfall, and whether the shortfall of the handicapped children from their potential is greater than that of their non-handicapped peers, all before reaching a decision in any case brought under the Act.

If it is to become the province of the Courts to direct state and local educational agencies to provide

handicapped children with an opportunity to achieve full potential, commensurate with the opportunity provided to other children, how are the aspects of potential which are outside the sphere of influence of the schools, and independent of them, to be handled? Given the factors which the District Court set forth as components of potential, one must ask, not only whether educational agencies are capable of providing such opportunities to any children; but also whether, in our society, that is a proper function of an educational agency. In New York State, most children attend school for six hours a day, 180 days per year. Factors which contribute to achievement of potential influence them during all their waking hours. Analysis of the effects of home life, relationships

with peers, family crises, and myriads of other circumstances on any child's ability to achieve potential, as well as compensation for the detrimental effects of any of those factors, is an impossible task, and certainly beyond the power of any educational agency.

Educational agencies have an obligation to provide each student with an opportunity to receive an education. This is true whether or not the student has a handicapping condition. The requirement under the Act, for provision of a free appropriate education, is a requirement that instruction and special services be designed for handicapped children, in order that they can benefit from the instruction provided, insofar as they are capable of so doing. Achievement of potential is a highly desirable

goal, but it is not the goal of the statute under consideration here; and the decision of the Court of Appeals, upholding the District Court's definition should be reversed.

3. The Court of Appeals erroneously upheld the decision of the District Court which was based, not on the unique needs of Amy Rowley, but on a particular philosophy of education of the deaf.

Under the Act, handicapped children are defined as those whose impairments mandate provision of special education and related services. 20 U.S.C. §1401(1), 45 C.F.R. §121a.5). Special education is defined as instruction specifically designed to meet the unique needs of the child. 20 U.S.C. §1401(16), 45 C.F.R. §121a.14(a)(1). The free appropriate public education which is to be provided to handicapped pupils must, inter alia, conform to an individualized education program which is especially designed to meet the unique needs of the child. 20 U.S.C. §1401(1)(16)(19).

The goal of the Act is provision of

an educational program which is based on evaluation of the unique needs of the individual child, and which is designed to meet those needs in the least restrictive environment.

The Hendrick Hudson Central School District assessed the unique needs of Amy Rowley; placed a sign language interpreter in her kindergarten classroom for a two week trial period; reviewed audiological test results and documents on education of the deaf provided by her parents; and evaluated her academic achievement, as well as her interaction with her teacher and peers. After careful analysis of the resulting data, the District's Committee on the Handicapped concluded that, due to her good residual hearing in the lower frequencies, her excellent lipreading ability and her rapport with

her teachers and peers, provision of a sign language interpreter was not a service which would appropriately meet Amy's unique needs. Her parents objected to this determination.

Mr. and Mrs. Rowley are proponents of the philosophy of education of the deaf known as total communication. Testimony of Respondents' witnesses at both the Hearing before the Independent Hearing Officer and at the District Court trial can be reduced to a syllogism: all deaf children benefit from the presence of a sign language interpreter in their classrooms; Amy Rowley is deaf; therefore, Amy Rowley would benefit from the presence of a sign language interpreter in her mainstream classroom. In contrast, Petitioners' witnesses, who had observed Amy in her classroom,

testified extensively as to her understanding of what transpired in the classroom, and her academic achievement.

Dr. Norman Doctor testified to an experiment in which he told a story to Amy, while Dr. Edmund Cortez signed the words. He stated that Amy paid attention only to him, and ignored Dr. Cortez' signing. J.A.229-230.

The most detailed and exhaustive testimony on how Amy functions in class was given by the noted audiologist, Dr. Ann Mulholland, who said that Amy's hearing in the low frequencies is close to normal. J.A. 302. She testified that when Amy was called from behind by her teacher, Amy turned around to face her. J.A. 267-268. The same phenomenon was observed by another expert, Marianne Pappas, a year prior,

in Amy's first grade class. J.A. 42.

The testimony by Ms. Pappas (J.A. 40-51) and Dr. Mulholland (J.A. 251-306; R-T 343-392) about their verbal interaction with Amy in each of two academic years is moving and startlingly convincing evidence that Amy understands all of what is transpiring in her class. It was unrebutted.

Dr. Mulholland's testimony left no doubt that Amy is succeeding. Amy can read and spell (J.A. 258-260); she communicates with the children around her (J.A. 262); she can do mathematics and help the children who are having difficulty (J.A. 263-269); she is comfortably and gracefully accepted by her teacher and fellow students (J.A. 274-276); and she scores well on both class and achievement tests (J.A.

277-282). Dr. Mulholland said that a sign language interpreter was not needed (J.A. 282), and might be harmful. J.A. 282-285. She said she felt that she had sufficient information to make a valid judgment, and that on the basis of her clinical experience Amy's education was appropriate and adequate. J.A. 276, 309; R-T 393-392.

The testimony of the School District's witnesses also showed beyond doubt that the goals developed for Amy as part of her individualized education program were met. (Those goals are stated in the IEP found at R-A 173-195).

After formulating its own definition of free appropriate public education, the District Court found that standard too difficult to apply. It therefore ignored all testimony as

to Amy's outstanding academic achievements, performance in class, and ability to comprehend what was taking place in the classroom; it focused instead on testimony as to general theories of the benefits of total communication to the deaf. The Court of Appeals affirmed the District Court's decision "substantially for the reasons set forth in Judge Broderick's well reasoned opinions" Pet. App. A-6; 632 F.2d 945, 947. However, the reasoning employed by the District Court in reaching its decision was clearly contrary to the manifest intent of the Act.

While the Act mandates provision of a special education designed to meet the unique needs of the handicapped child, the District Court ignored voluminous testimony concerning the

unique needs of Amy Rowley, and stated:

> . . . it is useful to consider Amy as a member of a class of similarly handicapped children, a class about which a good deal of useful information is available. The plaintiffs' experts established by their testimony, which was in this respect largely uncontradicted, that there is a marked trend towards the use of total communication in the education of the deaf -- a trend supported by studies showing the greater degree of success of students brought up in deaf households using total communication. Pet. App. C16, 483 F.Supp. 528, 535.

Another school of philosophy on education of the deaf exists, known as the Oral School, and Petitioners could have introduced quantities of testimony as to theories that deaf children with good residual hearing in the lower frequencies and excellent lip reading skills can benefit most from emphasis on the use of these skills, rather than the presence of a sign language

interpreter.[12] However, rather than presenting extensive testimony on the opposing school of education of the deaf, Petitioners emphasized the unique strengths and weaknesses of Amy Rowley in their presentations to both the Hearing Officer and the District Court. The Act does not mandate application of philosophies on education of particular categories of

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[12]Testimony of Dr. Ann Mulholland (J.A. 290-293). A.M. Mulholland (ed.) Oral Education Today and Tomorrow. Washington, D.C.: The Alexander Graham Bell Association for the Deaf, 1981. W.H. Northcott. Freedom Through Speech: Every Child's Right. The Volta Review, 1980, 83(3), 162-181. H.S. Lane. The Profoundly Deaf: Has Oral Education Succeeded? The Volta Review, 1976, Reprint No. 76M, 329-340.

handicapped students; rather, it mandates assessment of the unique needs of an individual handicapped child, in order to provide free appropriate public education for that child. Each child is a unique creature with his or her own abilities and deficits. Merely because a child fits into a particular category, due to one asset or disability, that does not mean that he or she is identical to all other children who can be similarly categorized. There are different kinds and degrees of disabilities within any given classification of handicapping conditions, and every child learns in a different manner and at a different rate, whether or not the child is classified as handicapped.

To require a sign language interpreter for a mainstreamed deaf

child as a result of testimony as to a certain philosophy of education of the deaf, is to totally disregard the individual needs and strengths of the particular child. While some deaf children can communicate only through signing, others make use of residual hearing and lip reading, and would be disadvantaged by reliance upon an interpreter.

Amy Rowley achieved academic success, received above grade level standardized test scores, and interacted well with caring teachers and her peers, without the use of a sign language interpreter. However, these are not the primary benefits of the educational experience provided to her by the School District. As an adult, Amy Rowley will have to function in a hearing world. Not only has Amy's

educational program enabled her to achieve academically, it has also provided her with the opportunity to exercise and enhance the skills she will require in order to live as a self-sufficient adult.

In his dissent to the decision of the Court of Appeals, Judge Mansfield stated:

> The language and legislative history of the Act demonstrate that Congress visualized a much more practical objective, i.e., an education for each handicapped child that would enable the child to be as free as reasonably possible from dependency on others, would enable the child to become a productive member of society, and would hopefully promote academic achievement by the child that would roughly approximate that of his or her nonhandicapped classmates. A child's unique needs are met whenever the child's IEP enables the child to meet those goals. See, in accord, Armstrong v. Kline, 476 F.Supp. 583, 604 (ED PA 1979). Judged by this standard, the IEP for Amy clearly complies with the Act without her having a sign language interpreter. Pet. App. A19; 632 F.2d 945, 953.

The decision of the District Court failed to address the unique needs of Amy Rowley, and its decision should be reversed.

4. The Courts below acted in excess of their jurisdiction under the Education for All Handicapped Children Act, and without regard to the administrative procedures contained in the Act.

In sustaining the District Court, the majority of the Court of Appeals disregarded the statutory scheme which recognized the State's primary jurisdiction over education, frustrated the intent of Congress by precluding the Commissioner's review of the placements made beyond the 1978-79 school year, and thus exceeded the court's statutory jurisdiction under the Act.

Under the Act, which creates a federal grant program administered by the states when they choose to participate, the status of each of the more than 200,000 handicapped children in New York is reviewed by the local

educational agency ("L.E.A.") at least once each year. (See also, New York Education Law, §4401(1). Upon completion of the review, which includes review of the progress in the present placement, the child is offered a placement which will meet his special educational needs for the next succeeding school year. If the parents disagree with the placement offered by the L.E.A., they may seek a due process hearing before an Impartial Hearing Officer.

Thereafter, either party may appeal the Hearing Officer's decision to the State Commissioner of Education, who conducts an impartial review of the hearing, and makes an independent decision upon the completion of his review. 20 U.S.C. §1415(c) and (d); New York Education Law, §4404(2) and (3).

It is incumbent upon the State Commissioner to review the placement offered and to determine if it is educationally sound and is in compliance with the State Plan. [13]

In this case, the Commissioner of Education, Gordon Ambach, followed the procedure and determined that Amy was receiving an appropriate education for the school year 1978-79.

Subsequent to the commencement of the action in District Court, but before the Commissioner was made a party defendant, the District and the Respondents stipulated that the

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[13]Not all the states participating in funding under the Act provide for this two-step administrative review. However, New York State has elected a two-step review procedure.

District Court should review the placement for the school year 1979-80, which had not yet begun. Pet. App. D-7; 483 F. Supp. 536, 538, n.1.

The Commissioner objected to the Court's jurisdiction to render a decision with respect to the child's appropriate placement for 1979-80 without the benefit of the prior administrative proceedings required by the Act. The Court held that not only did it have the jurisdiction to determine her 1979-80 educational placement, but also her placement for any year thereafter. Id. at 533. The Court of Appeals affirmed.

The appeal procedure established by Congress under the Act is in conformity with this Court's decisions underscoring the importance of local control of educational matters.

Milliken v. Bradley, 418 U.S. 717 (1974); San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973); Epperson v. Arkansas, 393 U.S. 97 (1968). As this Court has previously recognized, it is the local and state educational agencies, rather than the courts, which possess expertise in the educational field. Congress has adhered to this principle and the statute specifically requires annual review of placement, and an appeal to and decision by the state agency, prior to the commencement of any court action. 20 U.S.C. §1415(e)(2).

Congress intended that the courts, in applying the law set forth in the statute, would be able to review findings made by an agency possessing experience and expertise in the subject

at issue. That Congressional intent has been violated by the Court's acceptance of jurisdiction to decide educational placement issues which have not been the subject of administrative review.

A further exposition of this principle is found in §1415(e)(3) of the Act, as well as in New York Education Law, §4404(4). In that section, Congress clearly and unambiguously directed that during the pendency of any proceedings, including judicial review proceedings conducted pursuant to the Act, the child shall remain in the then current educational placement, unless the state or local educational agency and the parents otherwise agree. The requirement underscores Congress' concern for local control over such matters, and is a

direction to administrative hearing officers and the federal and state judiciary not to disturb the "status quo" until all such procedures have been completed. The courts below have disregarded this principle.

Following the District Court's decision, which changed Amy Rowley's educational placement and directed the provision of a sign language interpreter, the Petitioners filed a timely appeal with the Second Circuit. However, the District Court thereafter issued an Order to Show Cause directing Petitioners to appear and explain why they had not changed the status quo. On the return thereof, Petitioners indicated that an appeal had been filed and was being expeditiously perfected. The Court indicated that punishment for contempt would be directed unless the

Petitioners received a stay from the Court of Appeals.

Although the Court of Appeals subsequently granted a stay, that Court thereafter vacated the stay and directed a change in placement, even though an application for rehearing was pending and the Petitioners had indicated that further review by this Court would be sought.

The Commissioner was thus placed in the untenable position of having to defend his determination and himself in contempt proceedings, under a state of facts he never had an opportunity to review.

Petitioners respectfully contend that it was error for the District Court to determine Amy Rowley's educational placement in subsequent years without regard to the

administrative proceedings mandated under the Act. Ezratty v. Commonwealth of Puerto Rico, 648 F.2d 770 (1st Cir. 1981); Riley v. Ambach, ____F.2d ____, 3 EHLR 552:410 (2nd Cir. 1981); Davis v. Maine-Endwell Central School District, 646 F.2d 560 (2nd Cir. 1980), cert.denied, ____ U.S. ____, 101 S.Ct. 3080 (1981); Doe v. Anrig, 500 F.Supp. 802 (D Mass., 1980).

The Commissioner does not now contend, nor was it his position in the District Court, that once the 1979-80 school year began, the entire matter became moot. Neither does he insist upon an inflexible application of the exhaustion doctrine. However, that doctrine allows the administrative agency to develop a factual record, to apply its expertise to a particular problem, to exercise its discretion and

to correct its own mistakes, all before the court will intervene. The doctrine promotes accurate results in specialized administrative proceedings, not only at the agency level, but also by permitting a more informed judicial review. McKart v. United States, 395 U.S. 185 (1969).

The District Court's determination that the case would evade review if it was referred to an Independent Hearing Officer and the Commissioner for a determination for the 1979-80 school year, is not sustained by facts. See Footnotes 2 and 7 to the Statement of the Case, which set forth the time frame within which this case has been litigated.

Two months elapsed between the Committee's decision on October 4, and the submission of an additional

affidavit to it by the Respondents. After filing their Complaint in the District Court, the Respondents waited almost four months before moving for preliminary relief. The case could have been before the Court in early 1979 if the Respondents had proceeded expeditiously. Their delay should not be allowed to become the predicate for precluding the legally mandated prior administrative review.

The requirement of exhaustion of administrative remedies encourages expeditious decision making, and furthers specific Congressional intent. While there are instances in which the application of the doctrine will not serve those interests, e.g., where the issue may be purely one of law, this case does not represent such an instance. Had the District Court

referred the matter to the Commissioner, it would not have become embroiled in a philosophical and factual dispute concerning the best methods of educating deaf children. It is respectfully submitted that such an issue is a question of educational policy and not within the role of the federal judiciary.

5. Rule 0.23 of the Rules of the Second Circuit Court of Appeals should not have been applied to this case.

§0.23 of the Rules of the Second Circuit provides:

> The demands of an expanding case load require the Court to be ever conscious of the need to utilize judicial time effectively. Accordingly, in those cases in which decision is unanimous and each Judge on the panel believes that no jurisprudential purpose would be served by a written opinion, disposition would be made in open court or by summary order.
>
> Where a decision is rendered from the bench, a court may deliver a brief oral statement, the record of which is available to counsel upon request and payment of transcription charges. Where disposition is by summary order, the court may append a brief written statement to that order. Since these statements do not constitute formal opinions of the court and are unreported and not uniformly available to all parties, they shall not be cited or otherwise used in unrelated cases before this or any other court. (Emphasis added.)

The majority of the Court of Appeals has incorrectly invoked the above Rule to limit its holding in this case. In footnote 7 of its decision (Pet. App. A7, 632 F.2d 945, 948), the court stated:

> The majority of the panel of this Court which heard this appeal on May 1, 1980, voted shortly thereafter to affirm the judgment of the District Court and to do so pursuant to a provision of the rules of our court which would preclude citation of our decision at an authority in any other case, thus recognizing what we believe to be the lack of precedential character of our decision in view of the unique facts of this case. We continue to adhere to this view.

The Second Circuit has misapplied the above rule in this case. The decision of the Court was not unanimous, was not rendered from the bench, and was not disposed by a summary order. The facts are not unique. The District Court decided the

case in a manner which the Court of Appeals could not approve, and because it approved the result, it sought to limit the effect of its affirmance by invoking Rule 0.23.

The District Court concluded that every deaf child would fare better in the classroom with an interpreter, and therefore directed that an interpreter be provided to Amy Rowley by the State and local educational agencies. The Court found that each handicapped child should be given the same educational opportunity provided to non-handicapped children.

In order to gauge whether this opportunity was given to Amy Rowley, the Court required the measurement of her educational potential as compared with her actual performance, and a

comparison of the resulting differential or "shortfall" with that of non-handicapped children. Using its test and its method for applying the test it concluded that the Act required the provision of a sign language interpreter for a deaf child even though the unrebutted evidence proved the Respondent was performing above grade level and was proficient in reading. Those interpretations of the Act transcend the unique factual situation of Amy Rowley.

The issue in this case is the interpretation of an important statute applicable to all handicapped children. Although the facts will differ in individual cases, the meaning and interpretation should be uniform, and should not be any different for

Respondent than for any other handicapped pupil.

The undesirable effects of the Rule are highlighted by the facts in this case. The majority of the Circuit Court approved a novel requirement for measuring a school district's obligation to handicapped pupils. If the interpretation and reasoning of the majority of the Circuit Court is correct, it should be applicable to other deaf children. If an interpreter must be required for one child because she is deaf, regardless of need or cost, then why are other deaf children not entitled to the same benefit?

The application of Rule 0.23, even in a case to which it applies by its terms, encourages the Circuit Court to take too narrow a view of the issue.

Legislators and administrators must consider the overall consequences of policy decisions. Rule 0.23 may encourage the Circuit Court to give great weight to the emotional aspects of the case before it, and to adjust its interpretation of the law to its concept of "justice" in a particular case. It may be unpopular or harsh to deny special treatment to handicapped pupils, but "hard cases make bad law" is a sometimes valid maxim, and judicial responsibility requires more than compassion. It also requires restraint. The knowledge that decisions will be widely read and will be cited in similar cases, protects against hasty or illconceived interpretations, and helps assure that appellate review is thorough and legally correct, as well as equitable

in the particular instance. [14]

While Petitioners recognize the need for expeditious determinations to ease a court's heavy case load, the rule does not apply to this case, even by its expressed terms. This Court should disapprove the use of the rule in this situation and should also consider the fact that the majority's specific citation to and reliance on Rule 0.23 indicates some doubt as to their interpretation of the Act.

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[14]For example, where the Court has taken the time to thoroughly consider the issue of exhaustion of administrative remedies, it has reached the opposite conclusion on the issue than did the court in this case (See Davis v. Maine-Endwell, supra, and Riley v. Ambach, supra.)

CONCLUSION

The District Court should have dismissed the Complaint when the School District demonstrated that its program for the education of the Respondent was in conformity with the approved State plan. The definition of free appropriate public education formulated by the District Court was unnecessary, unworkable, and in derogation of the legislative intent. In ordering provision of a sign language interpreter for the Respondent, the District Court failed to consider her outstanding academic achievement, and her unique individual needs, as required by the Act. The Court of Appeals affirmed for the reasons set forth in the District Court's opinion, in disregard of the lack of

administrative review; and improperly invoked Section 0.23 of its rules.

Wherefore, Petitioners respectfully request that this Court reverse the judgment of the Court of Appeals and dismiss the Complaint.

December 15, 1981

Respectfully submitted,

RAYMOND G. KUNTZ
KUNTZ & SPLETZER, P.C.
Attorney for Petitioner
Board of Education
Hunting Ridge Mall
Bedford Village, New York 10506
(914) 234-6363

Teresa Kiernan Kuntz
Of Counsel

ROBERT D. STONE
Deputy Commissioner for Legal Affairs
Attorney for Petitioner
Commissioner of Education
State Education Building
Albany, New York 12234
(518) 474-6150

Jean M. Coon
Paul E. Sherman, Jr.
Donald O. Meserve
Of Counsel